IN THE

Supreme Court of the United States

October Term, 1967

No. 416

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN, FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and HELEN L. RUTTENWIESER,

Appellants,

against

JOHN W. GARDNER, as Secretary of the Department of Health, Education and Welfare of the United States, and HAROLD HOWE, 2d, as Commissioner of Education of the United States,

Appellees.

BRIEF OF THE NATIONAL COUNCIL OF CHURCHES, *AMICUS CURIAE*

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Interest of the *Amicus Curiae*

The National Council of the Churches of Christ in the United States of America is a membership corporation incorporated in 1950 under the Membership Corporations Law of the State of New York. It is the co-operative agency of thirty-four Protestant and Orthodox religious denominations with an aggregate membership of approxi-

mately 42,500,000 throughout the United States. Its government is by a representative General Board whose 255 members are selected by the constituent communions according to their respective procedures.

The corporate purposes of the National Council of Churches, as stated in its certificate of incorporation, are to act as:

> "an inclusive co-operative agency of Christian churches in the United States of America; to bring churches into further united service for Christ and the world; to strengthen the spirit of fellowship, service, and co-operation among them; to promote the application of the law of Christ in every relation of life; and to encourage and further the achievement of such purposes in local communities and throughout the world. It shall operate non-profit for these charitable, benevolent and religious purposes. * * *"

The National Council has always stood firmly for the principle of the independence of church and state, as affirmed by this Court in *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 216:

> "There is no answer to the proposition * * * that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. * * * This freedom was first in the Bill of Rights because it was first in the forefathers' minds; * * *

The National Council believes that those who are the possessors and intended beneficiaries of these essential freedoms have and should have, in their own interest and

in the interest of the freedoms themselves, the right to seek judicial protection when the government imposes an obligation to pay taxes to be used directly or indirectly for schools educationally affiliated with religious tenets or when government appropriates public moneys for such schools.

As an agency of Christian churches in the United States, the National Council has a direct interest in this problem because history has made clear that when government provides direct support to religious institutions both the religious institutions themselves and the personal liberties of their members invariably suffer. The National Council thus shares with this Court the belief that:

> "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum* v. *Board of Education*, 333 U.S. 203, 212.

The National Council of Churches also has a distinctive interest as an organization which supported the Elementary and Secondary Education Act, and continues to support it, in the belief that its provisions as outlined in the legislative history are not contrary to the Constitution as interpreted by this Court. (The National Council considers, however, that the implementation of the Act in some places has been inconsistent with the First Amendment.) As a friend of the Act, as well as of the Court, the National Council is uniquely qualified to urge that those who challenge the constitutionality of the Act's administration should be given their day in court to argue their claims on the merits.

The Questions for Review

Was the majority of the court below correct in ruling that plaintiffs have no standing to bring this action, and hence that the court lacks jurisdiction of the subject matter?

Was the majority of the court below correct in ruling that *Frothingham* v. *Mellon,* 262 U.S. 447, requires or permits dismissal of this action?

The Facts

The facts are not in dispute.

Since the complaint was dismissed "for lack of jurisdiction of the subject matter", the truth of its factual allegations must be assumed.

These allegations are that in administering Titles I and II of the Elementary and Secondary Education Act of 1965 (20 U.S.C. §§241a-241l, 812-827; Supp. I, 1965), the defendant federal officials are using funds raised by federal taxation to finance in religiously operated schools guidance services, instruction in reading, arithmetic and other subjects, and to enable such schools to obtain text books and other instructional materials. Thereby the government enhances the curriculum and facilities of schools operated by religious groups and releases funds of the managing religious groups for religious purposes.

The plaintiffs are individual citizens and qualified voters of the United States and of the State of New York. All

are federal taxpayers. One is a real property taxpayer in New York. One has children who attended the elementary and secondary grades of the New York City public schools.

The plaintiffs ask judicial determination that these uses of public funds and taxation to secure them are not authorized by the Act and are violative of the constitutional rights, privileges and immunities of the plaintiffs as citizens, voters, property owners and federal taxpayers, and that the federal government has no constitutional power to impose upon them tax obligations to supply funds usable for such purposes.

Title 20, §§821 et seq. of U.S.C., constituting Chapter 24, "Education", is entitled:

> "Grants for educational materials, facilities and services, and strengthening of educational agencies."

Subchapter I is entitled:

> "School library resources, textbooks, and other instructional materials."

As first enacted §821 carried an appropriation of $100,000,000 for the foregoing for the use of children and teachers "in public and private elementary and secondary schools" for the fiscal year ending June 30, 1966. Subsequent legislation increased the appropriation to $125,000,000 for 1967 and $150,000,000 for 1968.

Plaintiffs requested that a three-judge court be convened pursuant to 28 U.S.C. §§2282, 2284, to consider their contention that moneys appropriated under these statutes are being utilized in ways which violate the Establishment

and Free Exercise Clauses of the First Amendment. Defendants opposed the application for the convening of a three-judge court and moved to dismiss the complaint on the ground that plaintiffs lack standing to sue. The application for a three-judge court was granted. See *Flast* v. *Gardner*, 267 F. Supp. 351.

Before the three-judge court the defendants moved to dismiss the complaint. The court held (2-1) that plaintiffs had no standing to bring this action, that thus there was no justiciable controversy, and the court therefore lacked jurisdiction of the subject matter. Judge Frankel dissented. The opinions of the court below are reported at 271 F. Supp. 1.

POINT ONE

Plaintiffs, as citizens and as taxpayers, have standing to challenge federal appropriations alleged to constitute an encroachment upon the rights, liberties, and equality of the individual protected by the Establishment and Free Exercise Clauses of the First Amendment.

This appeal presents a basic problem of individual religious freedom. While the complaint challenges expenditure of money, money itself is not the ultimate issue. The Free Exercise and Establishment Clauses are coordinate restrictions on governmental powers, both designed with the purpose of protecting the citizen's freedom of conscience and belief. The Establishment Clause is, among other things, the embodiment of the Framers' recognition that one of the most important means of protecting individual religious liberty is to strip the government "of all power to tax, to support, or otherwise assist any or all religions." *Everson* v. *Board of Education,* 330 U. S. 1, 11. See also *Torcaso* v. *Watkins,* 367 U. S. 488, 492-93; *McGowan* v. *Maryland,* 366 U. S. 420, 442-43.

There is abundant history that support of religion by taxation was a principal evil at which the Establishment Clause was aimed.[1] Virginia was the proving ground in this respect for the entire Bill of Rights. There James Madison, through his Memorial and Remonstrance of 1785, led the resistance to a proposed tax for the payment of

1. The full historical record is amply reviewed in *Everson* v. *Board of Education,* 330 U.S. 1, both in the opinion of the Court and in the dissenting opinion of Justice Rutledge.

salaries of teachers of religion. He argued that no government should have the power to force a citizen to contribute "three pence only of his property for the support of any one establishment." Para. 3.

The Preamble of the Virginia Bill for Religious Liberty, authored by Madison and Thomas Jefferson, states the underlying principle: "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Commager, *Documents of American History,* p. 125 (1944). After the essential issues were settled in Virginia, there was little dissent in Congress from the proposition that the government should be utterly prohibited from using public funds to support religion. "[T]he provisions of the First Amendment * * * had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." *Id.* at 13.

The deep concern by the Framers of the Constitution over "support" was rooted in their fear of governmental coercion. This coercion takes two distinct forms—individuals are forced to expend their funds to support one or more religions, and, more subtly, they are also subjected to pressures to conform to prevailing attitudes. The existence of the first type of coercion is self-evident whenever a taxpayer is required to pay for a nominally secular program undertaken and controlled by a religious institution not responsible to public authority. With respect to the second, this Court stated in *Engel* v. *Vitale,* 370 U.S. 421, 431:

> "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."

That the majority below failed to take into account this second type of coercion is made clear by its statement that

> "If appellants established the requisite special injury necessary to a taxpayer's case or controversy, it would not matter that their dominant inducement to action was more religious than mercenary. It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct. We find no such direct and particular financial interest here." 271 F. Supp. at 3, quoting *Doremus* v. *Board of Education*, 342 U. S. 429, 434-35.

We maintain that this basis for the dismissal of the action is fundamentally erroneous because it does not recognize that the rights advanced here are not primarily monetary in nature. The substance of the Bill of Rights is freedom, not money, and the dominant inducement for this action is the protection of individual and social freedom, which the Constitution requires the national and state governments to respect.

To deny the citizen access to the courts for the protection of the rights so solemnly reserved to him by the Constitution unless he can show major financial damage is, we submit, to degrade the Bill of Rights from a declaration of fundamental liberties to a mere declaration of monetary rights, or to rhetorical abstractions.

Freedom of conscience is justiciable, no less than the freedoms of speech and press, not because of monetary evaluation but because of its intrinsic value—a value beyond mere money and the pocketbook. In *Sherbert* v. *Verner*, 374 U.S. 398, 412, Justice Douglas in concurring put as follows the principle which we believe determinative of this appeal:

> "*The result turns not on the degree of injury, which may indeed be nonexistent by ordinary standards.* The harm is the interference with the individual's scruples or conscience—an important area of privacy which the First Amendment fences off from government. The interference here is as plain as it is in Soviet Russia, where a churchgoer is given a second-class citizenship, *resulting in harm though perhaps not in measurable damages.*" (Emphasis added.)

An essential part of a citizen's right to freedom of religious belief is the right not to have his conscientious views disadvantaged by government action and use of funds. In *Everson* v. *Board of Education, supra,* 330 U. S. at 18, this Court emphasized that the Bill of Rights "requires the state to be a neutral in its relations with groups of religious believers and non-believers." When the government advantages with public money particular religions, either directly or indirectly by freeing private moneys for the purpose of religious education, it impairs the freedom of those who possess different or contrary tenets. That is, to the extent that the government directly or indirectly supports religiously affiliated schools it ceases to be "neutral" among its citizens in the field of religion, and it "disparages" and disadvantages those whose religious or non-

religious beliefs and practices do not include the establishment of private schools and those who belong to groups and sects whose numbers are few. See Madison, Memorial and Remonstrance, Para. 9.

And, as the Framers were well aware, the lack of neutrality inherent in government financial support of religion has historically been the forerunner of the more extreme coercion of religious persecution.

This Court has recognized the governing principle in the analogous constitutional area of legislative reapportionment. In *Baker* v. *Carr*, 369 U. S. 186, 207-08, it is stated:

> "The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-á-vis* voters in irrationally favored counties."

So here. The plaintiffs are placed by the Government in a position of constitutionally unjustified inequality *vis-a-vis* those religious groups whose activities are favored with public funds. This abrogation of the plaintiffs' *personal* rights invades the heart of the protections accorded by the First Amendment. See *Girouard* v. *United States*, 328 U. S. 61, 68; *Schneider* v. *State*, 308 U. S. 147, 161.

Furthermore, we submit that the rights the plaintiffs seek to vindicate are fundamental personal rights guaranteed by the Ninth Amendment. Religious activity, as much as the marital relation, is a "particularly important and

sensitive area of privacy." *Griswold* v. *Connecticut*, 381 U. S. 479, 495 (Goldberg, J. concurring).[2]

That these constitutional values are entitled to full respect is evident because the Framers and this Court have frequently emphasized that the "slightest breach in the wall between church and state" must be vigorously resisted." *Everson* v. *Board of Education, supra*, 330 U. S. at 18; that it is essential to "take alarm at the first experiment on our liberties * * * [and] not wait until usurped power [has] strengthened itself by exercise, and entangled the question in precedents," Madison, Memorial and Remonstrance of 1785, Para. 3; and that "relatively minor encroachments on the First Amendment" must be checked or "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent." *Abington School Dist.* v. *Schempp, supra*, 374 U. S. at 225.

The important policies which the First Amendment was designed to foster will be seriously threatened if the decision below is affirmed. As Judge Frankel noted below, the Government has acknowledged that "its arguments opposing plaintiffs' standing would be no different if the case involved federal appropriations to build churches for particular sects—i.e., presumably clear violations of the First Amendment's ban * * *." 271 F. Supp. at 5. In other words, just as the "same authority which can force a citizen to contribute three pence * * * for the support of any one establishment may force him to conform to any other establishment in all cases whatever," Madison, Memorial

2. See also *Rosenblatt* v. *Baer*, 383 U.S. 75, 92 (Stewart, J., concurring); Abrams, *What Are the Rights Guaranteed by the Ninth Amendment?*, 53 A.B.A.J. 1033 (1967).

and Remonstrance, Para. 3, so the principle which would deny judicial review here would also preclude judicial review of the most egregious cases of constitutional violation.[3]

This drastic consequence is plainly inadmissible under our constitutional scheme because the plaintiffs here meet the established criteria by which this Court has determined questions of standing in the past.

Justice Brennan has twice emphasized in leading cases that "'the concept of standing is a necessarily flexible one, designed principally to ensure that the plaintiffs have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions. * * *'" *Abington School Dist.* v. *Schempp, supra,* 374 U. S. at 267 n. 30, quoting from *Baker* v. *Carr, supra,* 369 U. S. at 204.

This standard is easily met in the instant case. We have already shown, in light of the purposes of the Bill of Rights, that appellants have a vital "personal stake" in the outcome of this litigation. Secondly, as Judge Frankel remarked below, "There has not been any suggestion that the suit is not genuine, robustly adverse, and likely to be fought on the kind of sharp and thorough presentation the courts must have for problems of such moment." 271 F. Supp. at 12 n. 11. Accordingly, plaintiffs are properly before this Court "as representatives of the public interest." *Scripps-Howard Radio* v. *FCC,* 316 U. S. 4, 14;

3. The doctrine *de minimis non curat lex* has been recognized by this Court as having no application to the Bill of Rights. See *Engel* v. *Vitale, supra,* 370 U.S. at 436, quoting the Memorial and Remonstrance.

see also *Associated Industries* v. *Ickes*, 134 F. 2d 694, 704 (2d Cir.), *vacated and remanded*, 320 U. S. 707 ("private Attorney Generals" may challenge official action).

In this light, it is important that there are no other prospective parties who have better, or indeed as good, standing to sue as the plaintiffs here. Although it is not the law that someone always must have standing to challenge legislation, a particular plaintiff or class of plaintiffs may be found to have standing because to deny it "might effectively foreclose judicial inquiry into serious breaches of the prohibitions of the First Amendment—even though no special monetary injury could be shown." *Abington School Dist.* v. *Schempp*, *supra*, 374 U. S. at 266 n. 30 (Brennan, J., concurring). Thus, this Court should be slow to deny standing to the plaintiffs in this case because such a ruling would immunize from review even the most flagrant violations of the Constitution—such as government appropriations to pay for church buildings or the salaries of ministers.[4]

The constitutional premise which underlines this analysis was stated by Justice Robert Jackson: "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the

4. The Court has applied this principle in analogous contexts, recognizing that protection of the "delicate and vulnerable, as well as supremely precious" rights of the First Amendment, *NAACP* v. *Button*, 371 U. S. 415, 433, may require exceptions "to the usual rules governing standing * * *." *Dombrowski* v. *Pfister*, 380 U. S. 479, 486; *NAACP* v. *Alabama*, 357 U. S. 449, 459; cf. *Barrows* v. *Jackson*, 346 U. S. 249.

courts." *West Virginia State Bd. of Education* v. *Barnette*, 319 U. S. 624, 638. This formulation is consistent with Madison's recognition that the validity of appropriations for religion could not be left to legislative judgment: "The preservation of a free government requires not merely, that the metes and bounds which separate each department may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people." Madison, Memorial and Remonstrance, Para. 2.

Judicial review is the constitutional method of preserving "the great Barrier" which protects the rights of the people. Accordingly, if the plaintiffs here are denied standing, the power of Congress to make appropriations for religion is effectively unlimited, and "the Legislature * * * may sweep away all our fundamental rights." Madison, Memorial and Remonstrance, Para. 15.

POINT TWO

Frothingham v. _Mellon_, 262 U. S. 447, neither requires nor justifies denial of standing to plaintiffs.

The sharp difference between *Frothingham* and this case, as suggested just last term by Mr. Justice Harlan, is that the plaintiffs here are not claiming that a possible financial loss is "by itself" a sufficient interest to sustain a judicial challenge to governmental action. *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 153. They are not asserting, as was Mrs. Frothingham, a roving commission to challenge federal appropriations. Instead, they invoke

the weighty interests sought to be protected by the First Amendment, all of which flow from their claim that public moneys are being used under the Education Act to support religious schools.

In *Everson* v. *Board of Education, supra,* the Court implicitly recognized that the plaintiffs have a justiciable interest by accepting without discussion the right of a local taxpayer to challenge school busing expenditures under the First Amendment. The only possible distinction between *Everson* and this case is the statement in *Frothingham* that "the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury * * * is shared with millions of others; [it] is comparatively minute and indeterminable." *Frothingham* v. *Mellon, supra,* 262 U. S. at 487. But this distinction is spurious. As distinguished commentators have pointed out, whatever validity it might have had in 1923, it no longer makes sense now when federal expenditures exceed one hundred billion dollars a year and some taxpayers pay millions of dollars a year.[5]

If the standing of a federal taxpayer is less than that of a state taxpayer, the anomaly will arise of the Bill of Rights being judicially enforceable in "support" cases against the States but not against the federal government. Not only would this be ironic in view of the First Amendment's primary purpose to serve as a bulwark against the central government, but it would result in a different version of the

5. Davis, *Standing to Challenge Government Action,* 39 Minn. L. Rev. 353, 387 (1955); Jaffe, *Standing to Secure Judicial Review: Public Actions,* 74 Harv. L. Rev. 1265, 1312 (1961); Wright, *Federal Courts* 37 (1963).

First Amendment being applicable to the federal government than to the States.

In *Frothingham,* the Court also expressed the fear that a different result would allow every taxpayer to bring suit to enjoin every federal expenditure: "The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion we have reached, that a suit of this character cannot be maintained." *Frothingham* v. *Mellon, supra,* 262 U.S. at 487.

This argument has no merit. In the first place, the present case arises under the Bill of Rights, and a decision by the Court here could have application only to similar actions.

Secondly, with respect to each challenge to legislation, only one suit would be necessary to determine the constitutionality of an expenditure. As stated by Judge Frankel below, "*Stare decisis*—and, before that, the powers of the lower courts to stay or consolidate redundant actions—will dispose of the matter with only the customary strain of adjudication for which courts sit." 271 U.S. at 17. For 20 years this Court has had appellate jurisdiction under *Everson* of the much larger number of anti-support actions that can be brought by municipal and state taxpayers, and there have been no signs of the "inconveniences" predicted in *Frothingham.*

Thirdly, in view of the fact that nearly all states permit actions by municipal taxpayers and a steadily increasing number of them (presently at least 34) allow actions by state taxpayers, see Note, Taxpayers' Suits: A Survey

and Summary, 69 Yale L. J. 895, 901-02 (1960), experience confirms that the courts will not be flooded.

The Court in *Frothingham* also evinced concern with the related problem of the separation of powers. "The functions of government under our system are apportioned. * * * The general rule is that neither department may invade the province of the other. * * * We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional." *Frothingham* v. *Mellon, supra,* 262 U. S. at 488.

But the special nature of the First Amendment distinguishes this case from *Frothingham.* The Framers included the Establishment Clause because they believed that government support of religious institutions would threaten individual freedom. The Clause thus embodies the conviction, directly relevant to the question of judicial review, that the individual is significantly affected by government spending in the area of religion even though he may not be so affected by spending in other areas.[6]

This special feature of the Establishment Clause is intimately linked to the "preferred position" of First Amendment rights and the corresponding practice of this

6. It has been argued that this Court's decision in *Doremus* v. *Board of Education,* 342 U.S. 429, shows that *Frothingham* applies in Establishment cases. But the *Doremus* case differed critically from the present one in that there was no allegation of specific expenditures in support of religion. The gist of the complaint was rather that Bible reading was required in public schools. This prompted the Court to conclude that the suit was not "a good faith pocketbook action." *Doremus* v. *Board of Education, supra,* 342 U.S. at 434. Obviously, *Doremus* can have no bearing here, where the appropriations of public funds run into hundreds of millions of dollars and are specifically for "library resources, textbooks and other printed and published instructional materials for the use of children and teachers in public or private elementary and secondary schools."

Court to scrutinize with particular care legislative action which threatens to impinge on such rights. See, e.g., *Thomas* v. *Collins*, 323 U.S. 516, 529-30; *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 n. 4. In this light it is plainly not an intrusion into the sphere of Congress for the courts to entertain suits brought to vindicate the rights asserted here.[7]

Conclusion

For the above reasons, the decision of the court below should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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7. There is a further reason why reversal of the decision below will not involve this Court in forbidden areas. The policy of separation of powers, which is at the root of the concern expressed in *Frothingham*, is also guarded by the political question doctrine. Over two-thirds of federal expenditures are for defense and foreign affairs, areas in which the Constitution gives authority to the political branches. Even if the political question doctrine did not apply, taxpayers would have no substantial grounds on which to attack federal expenditures. If taxpayers attempted to challenge federal programs, as Mrs. Frothingham did in 1923, it would be unavailing since decisions of this Court have made it clear that Congress may spend for the general welfare. *Helvering* v. *Davis*, 301 U. S. 619; *Steward Machine Co.* v. *Davis*, 301 U. S. 548; *United States* v. *Butler*, 297 U. S. 1.